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Defining the Proper Scope of the Business Necessity Defense in Title VII Litigation

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NOTES

DEFINING THE PROPER SCOPE OF THE BUSINESS NECESSITY DEFENSE IN TITLE VII LITIGATION

The provisions of Title VII of the Civil Rights Act of 1964[1] place a substantial burden on employers to justify employment practices challenged as discriminatory in application or effect.[2] In the vast majority of cases, this burden is outweighed by the benefits granted to employers under the Act. For the small business, however, the need to justify a hiring practice challenged as discriminatory can become an onerous burden on the company's economic resources.[3] Such an employer must ultimately choose between incurring a severe financial deficit for litigation costs or abandoning the employment practice in question.[4] In many cases, the latter choice presents the only feasible alternative for the businessman wishing to continue profitable operation of the enterprise.[5]

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1. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979) [hereinafter cited as Title VII or the Act].

2. *See* Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974) [hereinafter cited as Yale Note].

The author gives three examples of the types of costs associated with Title VII compliance:

> First, the law may result in a loss of economic efficiency because it forbids the overt use of race or color as a job requirement. A second cost to an employer results when facially nondiscriminatory qualifications that can achieve efficiencies are held to be unlawful. Finally, an "anticipatory" cost occurs if the employer substitutes less efficient hiring or promotion practices for his normal procedures in order to achieve results that reduce his risk of exposure to the enforcement machinery of the fair employment law. Title VII reflects congressional consideration of each of these three costs.

Id. at 102. *See also* Landes, *The Economics of Fair Employment Laws*, 76 J. POL. ECON. 507 (1969). *See generally* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 253-63 (1971); United States v. South Carolina, 445 F. Supp. 1094, *aff'd*, 434 U.S. 1026 (1978).

3. Employers with less than 15 employees are not included within the mandates of Title VII. 42 U.S.C. § 2000e(b) (1976).

4. *See generally* 29 C.F.R. 1607 (1980) for examples of the extensive record keeping costs required by these guidelines. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976).

5. Once a plaintiff establishes a *prima facie* case of discrimination, the burden is upon the employer to establish the defense of business necessity. McDonnell Douglas Corp. v.

There are few legitimate defenses available in Title VII litigation. Consequently, the courts have made a determined effort to narrow the subsequent implications of their decisions by limiting them to the specific factual situation presented. Two recognized affirmative defenses, however, exist as valid justifications for an alleged violation: the bona fide occupational qualification (BFOQ)[6] and the business necessity exception.[7] Congress included the BFOQ provision in Title VII in an attempt to minimize the burdens of the Act in cases of legitimate employer need.[8] This exception allows the employer to use otherwise prohibited classifications[9] as explicit criteria for employment decisions. It contemplates an intent on the part of the employer to use overtly discriminatory criteria for employment.[10] Its ultimate justification is the proven relationship between the

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Green, 411 U.S. 792, 802-03 (1973), *on remand*, 390 F. Supp. 501 (E.D. Mo. 1975), *aff'd*, 528 F.2d 1102 (8th Cir. 1976). *See generally* Note, *Employment Testing: The Aftermath of Griggs v. Duke Power Co.*, 72 COLUM. L. REV. 900 (1972). In this article, the author proposes several justifications for placing the burden on the employer: availability of employer's financial resources, employer access to information, and public policy favoring employees. *Id.* at 908.

6. 42 U.S.C. § 2000e-2(e) (1976) states in pertinent part:

> Notwithstanding any other provisions of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership, or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

7. The business necessity exception is presently applied in situations involving a facially neutral practice which has discriminatory results. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (involving general aptitude tests which were evenly applied but found to have a discriminatory result); Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), *vacated on other grounds*, 440 U.S. 625 (1979) (involving a facially neutral minimum height requirement for county firemen); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971) (involving a facially neutral seniority system which perpetuated the effects of prior discrimination).

8. *See* 110 CONG. REC. 2550 and 1325 for proposals in both the House and Senate to add race to the BFOQ exception. Although these amendments were ultimately rejected, the Representatives did pose some interesting examples of when race could be used as a legitimate qualification by an employer, *e.g.*, salespeople of products used primarily by blacks, announcers on black radio stations, and the black theatre community. Although these situations were recognized as unique, on balance the Representatives felt that an amendment of this nature would potentially undermine the purpose of Title VII.

9. The prohibited criteria are religion, sex, and national origin. 42 U.S.C. § 2000e-2(e) (1976).

10. Swint v. Pullman-Standard, 624 F.2d 525 (5th Cir. 1980). In this recent case, the

overt criteria and the legitimate needs of the business involved.[11]

The business necessity defense, on the other hand, was judicially created. It originated in the aftermath of Title VII when employers established facially neutral job criteria as a pretext for discrimination.[12] At times, courts considered the establishment of these criteria permissible, even though in violation of Title VII, if the qualifications set were necessary for the efficient operation of the business.[13] In its origins, this doctrine is distinguishable from the BFOQ provision in that it does not require overt discrimination. Rather, the application of this defense is based on the practical effect of the criteria involved.

The business necessity defense is presently applied to employment practices fair in form but discriminatory in effect.[14] Because this exception has been so narrowly applied and because the BFOQ provision, by its language, does not apply to discriminatory practices concerning race,[15] one area has been left unexplored: the rare situation in which race is used as a legitimate occupational qualification.[16] This Note will investigate the pos-

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court stated that "[w]e believe that the omission of race and color as bona fide occupational qualifications was deliberate and intentional on the part of Congress." *Id.* at 535.

11. *See, e.g.*, Garcia v. Gloor, 609 F.2d 156, 163-64 (5th Cir. 1980).

12. *See generally* Blumrosen, *infra* note 17.

13. Although the two defenses are distinct in origin, courts at times have confused them. *See, e.g.*, Meadows v. Ford Motor Co., [1973] 6 LAB. REL. REP. (BNA) (Fair Empl. Prac. Cas.) 795 (court interpreted a facially neutral requirement of the ability to lift 150 lbs. in terms of BFOQ); Gilbert v. General Electric Co., 375 F. Supp. 367 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd on other grounds*, 429 U.S. 125 (1976) (analyzing a pregnancy disability as an aspect of the business necessity doctrine); deLaurier v. San Diego Unified School Dist., 588 F.2d 674 (9th Cir. 1978) (court analyzed maternity leave policy in terms of business necessity).

14. *See* note 8 *supra*. *See generally* Note, *Fair Employment Practices: The Concept of Business Necessity*, 3 MEM. ST. U.L. REV. 76 (1972) [hereinafter cited as Memphis Note]; Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911 (1979) [hereinafter cited as Chicago Comment]; Comment, *Title VII: Discriminatory Results and the Scope of Business Necessity*, 35 LA. L. REV. 146 (1974).

15. Race is conspicuously absent from the BFOQ category. *See* note 8 *supra*. One commentator suggests various ways in which an employer may wish to utilize race, i.e. wage differentials in expectations, consumer's racial preferences, or as a societal recognition of certain talents. Fiss, *supra*, note 2, at 248-58. *See generally* Yale Note, *supra* note 2, at 102.

16. For one example of this situation, see A. LARSON, EMPLOYMENT DISCRIMINATION, Vol. 3 § 72.10 (1979) in which the author states:

> Perhaps the only way an employer could deal with this type of problem would be to cast his requirements in neutral terms so as to come within *Griggs* and its business necessity rule. The employer might, let us say, announce that he will consider applicants for the part of Henry VIII only if they bear a sufficient likeness to Henry VIII so that, with suitable make-up, they would present a convincing representation of the well-known monarch. This would rule out women, and many men too thin to be successfully padded out or too short to be adequately regal, as well as most blacks. As to black applicants, the employer could quite possibly contend

sibility of extending the business necessity doctrine to justify the use of race as a standard or qualification for employment; in other words, extending the doctrine to overt as well as covert racial qualifications. It is the author's contention that there is no restriction in either the decisions enunciating the business necessity doctrine or in the legislative history of Title VII that would foreclose this possibility. Even though lower courts have interpreted the doctrine narrowly, an employer can legitimately utilize the business necessity defense to justify an overtly discriminatory hiring policy. This Note will conclude that, if an employer can meet the rigid standards of justification applied in Title VII litigation, the business necessity defense could be utilized to validate the challenged hiring policy.

I. ORIGINS OF THE BUSINESS NECESSITY DOCTRINE

A. The Title VII Problem Defined

When Congress passed Title VII, it anticipated compliance problems for employers and granted a period for voluntary compliance before the Act took effect.[17] But even after this date, tangible guidelines for employment decisions were practically nonexistent.[18] Many employers remained uncertain as to the required method or extent of compliance, especially when this new legislation imposed a major alteration in the functioning of the business.[19] For this reason, employers chose one of two possible alternatives: changes in the present system to comport with the employer's interpretation of Title VII requirements[20] or litigation to retain the existing system.[21] The Act itself contained the BFOQ provision, but this presented

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persuasively that no amount of white make-up would do an adequate job of transformation, just as no amount of padding would save the day for a 110-pound white aspirant. Therefore, the neutral test of rough similarity to Henry might be successfully backed up by the business necessity rule.

Id. at 14-3, -4.

17. Civil Rights Act of 1964, Pub. L. No. 88-352, § 716(a), 78 Stat. 241. *See* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972). Title VII became effective on June 16, 1968, a year after the date it was passed.

18. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). This was the first case interpreting the rights granted under Title VII. The Court determined that a rule against hiring women with preschool children could be challenged under Title VII if men with preschool children were hired by the same company.

19. *See* Blumrosen, *supra* note 17, at 61.

20. Professor Blumrosen notes two varieties of changes: adoption of tests or educational requirements and changes in seniority systems. *Id.* at 64.

21. *Cf.* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert denied*, 397 U.S. 919 (1970); Gregory v. Litton Systems Inc., 316 F. Supp. 401 (C.D. Cal. 1970); Hicks v. Crown Zellerbach Corp., 310 F. Supp. 536 (E.D. La. 1970); Clark v. Ameri-

only a narrow exception. Many employers, unsure of the allowable employment options, litigated under novel theories, hoping to validate employment practices they felt should be allowed under the Act.[22] The employers' strongest claim was the allegation that some employment practices outlawed by the Act were essential to the efficient operation of their businesses.[23]

B. The Griggs Decision

The Supreme Court in *Griggs v. Duke Power Company*[24] clarified the initial problems of compliance with Title VII faced by employers. *Griggs* was a class action instituted by thirteen black employees of Duke Power Company.[25] The plaintiffs claimed that Duke's policy of requiring a high school diploma or the passing of an equivalency test[26] for employment in or transfer to the upper level job classifications[27] violated Title VII's mandates.

Under their Title VII claim, the employees presented two major arguments.[28] First, they asserted that the requirements operated to freeze the

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can Marine Corp., 297 F. Supp. 1305 (E.D. La. 1969); Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968).

22. See cases cited in note 21 *supra*.

23. *See, e.g.*, Jones v. Lee Way Motor Freight Inc., 431 F.2d 245 (10th Cir. 1970), *cert denied*, 401 U.S. 954 (1974); Quarles v. Phillip Morris Inc., 279 F. Supp. 505 (E.D. Va. 1968).

24. 401 U.S. 424 (1971).

25. *See generally* Wilson, *A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844 (1972); Blumrosen, *supra* note 17.

26. The tests were the Wonderlic Personnel Test, a general ability test, and the Bennett Mechanical Comprehension Test. These tests were found to be more stringent than the high school education requirement in that they would screen out approximately half of the high school graduates. 401 U.S. at 428.

27. The plant was separated into five departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Testing. Blacks were only employed in the Labor Department in which the highest salary was less than the lowest salary in the four other departments. Promotions within departments were made on the basis of seniority within the department, and a transferee into a new department would usually begin at the lowest level. 401 U.S. at 427.

28. 401 U.S. at 426. At the time of the *Griggs* decision, Title VII provided in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
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> . . . .
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> . . . .
>
> (h) Notwithstanding any other provision of this title, it shall not be an unlawful

effects of past discrimination in that whites already employed in the upper level jobs without the educational prerequisites could transfer, while blacks in the lower departments could not transfer without the required education. Second, the employees maintained that the requirements operated to exclude a disproportionate number of blacks. They relied on EEOC guidelines, mandating that, unless Duke could demonstrate the requirements' job relatedness, the requirements must fail.[29]

The district court rejected the arguments raised by the employees.[30] It ruled that, since Duke had abandoned its racially discriminatory policy before Title VII became effective, it could not grant relief.[31] Since the district court conceded that Duke's present work force was tainted by the vestiges of prior discrimination,[32] its holding directly refuted the employees' first contention that such discrimination violated Title VII. The court rejected the rationale of another district court in a similar case[33] and held that Duke's educational requirements, if fairly and evenly administered, were valid employment policies, even though they were not directly related to job performance.[34]

> employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test, provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex or national origin.

Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 703(a) & (h), 78 Stat. 255 (current version at 42 U.S.C. § 2000e-2(a) & (h) (1976)).

29. The court quoted the EEOC guidelines on testing procedures in effect at the time as follows:

> The Commission accordingly interprets "professionally developed ability test" to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.

401 U.S. at 433 n.9.

30. 292 F. Supp. 243 (M.D.N.C. 1968).

31. From the legislative history of Title VII, the court concluded that it could grant prospective relief only, and to administer this relief there had to be a showing of overt discrimination after the date of the Act's effectiveness. *Id.* at 248, 251.

32. *Id.* at 248.

33. Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). This case involved restrictions upon employees in departmental transfers where the departments had been previously organized in a racially discriminatory fashion which was held to be violative of Title VII. *Id.* at 510-21. The plaintiffs in *Duke* relied on *Quarles* to support their argument that present consequences of past discrimination were covered by Title VII, but this proposition was specifically rejected by the lower court. 292 F. Supp. at 249.

34. 292 F.2d at 249-50. The court interpreted § 703(h), 42 U.S.C. § 2000e-2(h) (1976), along with § 703(j), 42 U.S.C. § 2000e-2(j) (1976), to mean that Title VII does not bar the

The United States Court of Appeals for the Fourth Circuit reversed in part the district court's opinion.[35] The circuit court agreed that Title VII was designed solely to grant prospective relief, but it extended this relief to alleviate the present effects of past discrimination.[36] The court went on to uphold the lower court's ruling that educational requirements do not have to be job related, thus placing itself in direct opposition to a previous EEOC interpretation.[37] The court justified this holding by interpreting the legislative history of Title VII to mean that to require an employer to bear the burden of demonstrating a direct relationship between an employment qualification and the specific task to be performed would be too stringent a burden for an employer.[38] Noting the congressional intent to permit cer-

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use of a test which is a measure of general intelligence but unrelated to job performance. Section 703(j) states:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

35. 420 F.2d 1225 (4th Cir. 1970).

36. *Id.* at 1230. In doing this, the circuit court relied heavily on Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), and quoted language of that case that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." 420 F.2d at 1230, *quoting* Quarles v. Phillip Morris, Inc., 279 F. Supp. at 516.

37. 420 F.2d at 1233-35.

38. The court examined a memorandum of Senators Clark and Case [hereinafter cited as Clark-Case memorandum] which it quoted as follows:

> There is no requirement in Title VII that employers abandon bona fide qualification tests *where, because of the differences in background and education, members of some groups are able to perform better on these tests than members of other groups*. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance. (emphasis added by court).

420 F.2d at 1235. *See* 110 CONG. REC. 7213 (1964). This controversy concerning the ability of an employer to administer any type of test under Title VII started after the decision of the Fair Employment Practices Commission in Illinois in Myart v. Motorola, Inc., reproduced in 110 CONG. REC. 5662-64 (March 19, 1964). This case suggested that standardized tests could never be utilized by an employer even if justified by a legitimate business need. This decision made many Congressmen wary of creating any limitation on an employer's ability to use test results.

tain employer discretion in determining competence of job applicants, the court effectively rejected the employees' second contention that requirements, to survive a Title VII challenge, must be job related.[39]

In his concurring and dissenting opinion, Judge Sobeloff foreshadowed the views that the Supreme Court would later adopt.[40] Relying not only on a prior EEOC interpretation of Title VII[41] but also on significant parts of a district court opinion[42] rejected by the majority, he concluded that a discriminatory employment requirement which does not have a significant relationship to a legitimate business need cannot survive a Title VII challenge.[43] He interpreted the legislative history of Title VII to allow the use of specific employment requirements only if these requirements were conclusively related to job performance.[44]

In a unanimous opinion,[45] the Supreme Court reversed the court of appeals.[46] The Court addressed the issue of whether the establishment of educational requirements for initial employment or intercompany transfer, when the requirements were not substantially related to job performance, effectively operated to exclude a disproportionate number of blacks and perpetuate the vestiges of past discriminatory policies.

The Supreme Court rejected the circuit court's interpretation of Title VII, concluding that the controlling purposes of the Act were to provide equal opportunity and to remove any remainders of past discriminatory barriers.[47] In so deciding, the Court extended the Act's coverage to barriers operating to discriminate invidiously as well as to those which were overtly discriminatory. The determinative factor in justifying a challenged employment practice is business necessity: if a practice operating in a discriminatory fashion cannot be shown to be related to job performance, the practice must cease.[48]

Because Duke was unable to establish the link between the employment criterion—a high school diploma—and job performance, the Court invali-

39. 420 F.2d at 1234-35.

40. *Id.* at 1237-48 (Sobeloff, J., dissenting).

41. In placing reliance on the EEOC interpretation, the judge looked to the view expressed by the Supreme Court that a court should show great deference, when interpreting a statute, to the officers or agencies charged with its administration. *Id.* at 1240-41, *citing* Udall v. Tallman, 380 U.S. 1, 16 (1965).

42. 420 F.2d at 1237, *citing* Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

43. 420 F.2d at 1246.

44. *Id.* at 1241-44.

45. Mr. Justice Brennan took no part in the consideration or decision of the case.

46. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

47. *Id.* at 429-30.

48. *Id.* at 431.

dated the requirement. In so doing, however, the Court explicitly recognized the right of an employer to establish job criteria[49] as long as they "measure the person for the job and not the person in the abstract."[50] It was thus expressly recognized that an employer could develop job criteria as long as those criteria served as an objective measure of job performance.[51]

C. The Judicial Modification of Griggs

Although the *Griggs* decision cleared up the confusion among the lower federal courts in determining the proper scope of Title VII, only a few general guidelines bound the literal application of the Act's mandates.[52] The concept of business necessity, discussed by some courts prior to *Griggs*,[53] had to be modified to conform to the new standard enunciated in *Griggs*.

Facing this challenge, different courts focused on various aspects of the *Griggs* decision, thus creating multiple standards.[54] Shortly after *Griggs*,

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49. *Id.*

50. *Id.* at 436.

51. The circuit court's reading of the legislative history of Title VII, especially its reliance on the Clark-Case memorandum, *supra* note 38, was qualified by the Court. Looking more extensively into the legislative background, the Court stated in reference to the memorandum:

> However, nothing there stated conflicts with the later memorandum dealing specifically with the debate over employer testing, 110 CONG. REC. 7247 . . . , in which Senators Clark and Case explained that tests which measure "applicable job qualifications" are permissible under Title VII. In the earlier memorandum Clark and Case assured the Senate that employers were not to be prohibited from using tests that determine *qualifications*. Certainly a reasonable interpretation of what the Senators meant, in light of the subsequent memorandum directed specifically at employer testing, was that nothing in the Act prevents employers from requiring that applicants be fit for the job.

Id. at 435 n.11.

52. *See* Memphis Note, *supra* note 14, at 83; Chicago Comment, *supra* note 14, at 918.

53. *See, e.g.*, Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (case decided before *Griggs* holding that employment practices with a discriminatory impact can be justified if there is a legitimate, overriding nonracial business purpose); Jones v. Lee Way Motor Freight Inc., 431 F.2d 245 (10th Cir.), *cert. denied*, 401 U.S. 954 (1970) (holding that an employment practice with a disparate impact can be justified by business necessity only if it is found to be necessary to the safe and efficient operation of the employer's business).

54. *Compare* United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971) (to validate an employment practice which is challenged as having a disparate impact, an employer must show that the practice in controversy is essential to the safe and efficient operation of the business) *and* United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir.), *cert. denied*, 406 U.S. 906 (1972) (employer must show practice necessary for safety and efficiency) *with* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir.), *reh. denied*, 494 F.2d 1296 (5th Cir. 1974) *and* Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th

though, one court formulated a test which amalgamated the several theories of business necessity. In *Robinson v. Lorillard Corporation*,[55] the United States Court of Appeals for the Fourth Circuit was faced with an employee challenge to a seniority system created by a collective bargaining agreement within the corporation.[56] The petitioner alleged that the system, though neutral on its face, created a discriminatory barrier to the advancement of certain black employees.

The opinion, written by Judge Sobeloff, the lone dissenter in the *Griggs* decision at the appellate level, illustrates a sophistication of his prior interpretation of the Act. After determining that the system discriminated against the black employees as alleged,[57] the court examined the purpose of the policy. If Lorillard could assert a valid business reason for its creation and perpetuation, this system would not be struck down as violative of Title VII.[58] The court formulated a three-part test to assess the reasons advanced as business necessities by the defendant:

> [T]he business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact (footnotes omitted).[59]

Applying this test to the justifications advanced by Lorillard, the court struck down the system as violative of Title VII.[60] Although Lorillard was

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Cir. 1974) (an employer cannot claim business necessity unless there is no other employment possibility available with lesser racial impact) *and with* EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821 (2d Cir. 1976) (business necessity can be established by showing the challenged practice is related to job performance).

55. 444 F.2d 791 (4th Cir. 1971).

56. The challenged provisions allowed a transferring employee who was laid off from his new job due to lack of seniority to return to his old department and retain his seniority there. It also provided that job openings would be filled by the most senior interested employee within the department without regard to prior experience. Finally, employees who did transfer gave up seniority and began as new employees in the new department. *Id.* at 794.

57. *Id.* at 795-96.

58. *Id.* at 797.

59. *Id.* at 798.

60. The system was found to discriminate against certain black employees who were not able to transfer as readily as whites. The court did not accept any of Lorillard's justifications for the discriminatory impact. The reasons proffered were industry practice, previous experience, avoidance of union pressure, and efficiency, economy, and morale. *Id.* at 798-99. The court stated that the last of these came the closest to a valid justification, but Lorillard was not able to establish enough evidence of the required relationship to the challenged employment practice. *Id.* at 799-800.

unable to satisfy the requirements for the business necessity defense, the test used by the court has been applied to analyze other practices challenged under Title VII.

The first prong of the test suggests a balancing approach,[61] weighing the necessity of the practice against its discriminatory impact. Although the legislative history of Title VII is silent concerning business necessity, the congressional discussions do recognize that the judiciary should have the opportunity to assess the facts of each case.[62] With this flexible posture, a court retains the ability to consider the monetary cost of compliance to the employer, evaluating the size of the business and the number of employees affected. This balancing approach gives the court an opportunity to make individual decisions, a power contemplated by the drafters of Title VII.[63]

The second phase of the *Lorillard* test involves the apportionment of the burdens of proof involved in the business necessity defense. It requires the employer to offer proof that there is a tangible connection between the discriminatory employment practice and the business purpose it is intended to further.[64] This aspect of the test incorporates touchstones of the previous business necessity defense: safety, efficiency, and necessity.[65]

Additionally, this prong of the test considers the burdens of proof each party must bear. Although this aspect was not fully developed in *Lorillard*, it was later refined by the Supreme Court in *Dothard v. Rawlinson*.[66] That case involved a facially neutral statute which required that a person

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61. For an analysis and favorable critique of the *Lorillard* balancing approach, see Memphis Note, *supra* note 14, at 85. *But see* Yale Note, *supra* note 2, where the author rejects the notion of a balancing approach and suggests the acceptance of a "no-alternative approach." *See generally* Note, *Facially Neutral Criteria and Discrimination Under Title VII: 'Built-in Headwinds,' or Permissible Practices?*, 6 U. MICH. J.L. REF. 97, 109 (1972); Note, *Application of the EEOC Guidelines to Employment Test Validation: A Uniform Standard for Both Public and Private Employers*, 41 GEO. WASH. L. REV. 505 (1973).

62. *See* 118 CONG. REC. 700 (1971) (remarks of Sen. Fannin: "civil rights are a matter of human understanding and common sense, qualities possessed by the judiciary as much as by any agency"); 117 CONG. REC. 32091 (1971) (remarks of Rep. Ford); *id.* at 32101 (remarks of Rep. Shopu: "courts are designed to balance all issues"). This is also the reason the EEOC was not given cease and desist powers. *See* 117 CONG. REC. at 3136 (remarks of Rep. Allen, stating that he feared that a hearing before such a predispositioned group would effect business efficiency). *See also id.* at 32108 (remarks of Rep. Patrick, to the same effect). *See generally* Yale Note, *supra* note 2, at 105 n.33, 112 n.64.

63. *See generally* Yale Note, *supra* note 2, at 105 n.33, 112 n.64.

64. For a specific example relating to employment testing, see 29 C.F.R. 1607 (1970). *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Spurlock v. United Airlines Inc., 475 F.2d 216 (10th Cir. 1972); Richardson v. Hotel Corp. of Am., 332 F. Supp. 519 (E.D. La. 1971), *aff'd*, 468 F.2d 951 (5th Cir. 1972).

65. 444 F.2d at 798.

66. 433 U.S. 321 (1977).

filling the position of corrections counselor[67] must weigh at least 120 pounds.[68] The *Dothard* court stated that, to establish a *prima facie* case of discrimination, the plaintiff must demonstrate that the challenged standards operated in a discriminatory fashion.[69] This was to be accomplished by showing that the standards, in effect, attained an unjust pattern of hiring.[70] The employer must then justify the practice by demonstrating a relationship between the practice and the job.[71] If the employer meets this burden, the plaintiff may then proffer other procedures which would attain the same goals with a less disparate impact.[72] This apportionment of the burdens of proof serves two important purposes in the litigation. First, it forces the employer to demonstrate the job relatedness required by *Griggs*. Second, it allows the trier of fact to assess the strength of the relationship as well as the tangible connection between the qualification and job performance.[73] This aspect of the test comports with other interpretations of Title VII by allowing an employer to create a qualification and, if approved by the trier of fact, to provide employment opportunity to all who meet the qualification.[74]

The last aspect of the *Lorillard* test requires the absolute necessity of the practice.[75] Business necessity is distinguishable from business ease, purpose, or convenience.[76] The employer must establish the unavailability of other means to achieve a goal that is absolutely necessary to the efficient operation of the business. This is also the stage at which any suggested alternative methods are assessed with respect to their business efficiency as

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67. Correctional counselor is a reference to a prison guard. *Id.* at 323.

68. The statute in question also required a minimum height of five feet two inches. The statute provides:

> *Physical qualifications*—The applicant shall be not less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician . . . as in good health and physically fit for the performance of his duties as a law enforcement officer.

ALA. CODE, § 36-21-46(a)(4) (1975).

69. 433 U.S. at 329. *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

70. 433 U.S. at 329. This can be accomplished by the use of statistics. *Id.* at 330. *See also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 (1977).

71. 433 U.S. at 329.

72. *Id.* at 330-33.

73. *See* note 62 and accompanying text *supra*.

74. *See, e.g.*, Griggs, 401 U.S. at 431.

75. 444 F.2d at 798.

76. *See, e.g.*, United States v. Jacksonville Terminal, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) (business necessity does not mean business convenience); Myers v. Gilman Paper Corp., 544 F.2d 837 (5th Cir.), *reh. denied*, 550 F.2d 41 (5th Cir. 1977) (immediate compelling need for practice is a basis for business necessity).

well as racial impact.[77] The employer can come forward with the reasons for establishing the practice, and the employees can highlight alternative methods of attaining the goal which would result in a lesser racial imbalance.[78]

In *Lorillard*, the court formulated a precise method for an application of the theory expressed in *Griggs*.[79] Although *Lorillard* perhaps added to *Griggs* in some respects, the underlying rationale of both cases is similar. While some courts use alternative methods of analysis,[80] even these courts find that their method could be incorporated into the *Lorillard* test for a more thorough analysis of the factual situation. Therefore, the test enunciated in *Lorillard* appears to be the most acceptable method of analyzing the business necessity defense.

II. Application of the *Griggs-Lorillard* Standard to Racial Employment Criteria

A. The Legislative Intent of Title VII

Since the business necessity defense was judicially created, there is no discussion of it in the legislative history of Title VII. Nevertheless, a court must examine the compatability between the basic objective of Title VII and the business necessity defense. The present conservative application of the business necessity defense evidences the basic canon of statutory interpretation that a court will not interpret a statute in a way that frustrates its intent.[81] The judiciary will not frustrate the valid purpose of Title VII by allowing a defense having an over-broad application.[82]

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77. The degree to which this must be shown is presently uncertain. The major area of confusion rests in the allocation of the burden of proof of this fact. *See, e.g.*, Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974) (court's holding specifically included as a major factor the lack of proof by the employer of unavailability of alternatives); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973) (court speaking of lack of employer's investigation into alternative means of compliance). *See also* Yale Note, *supra* note 2, where the author argues that, before an employer can utilize the business necessity defense, he must prove the absolute unavailability of alternative means of compliance.

78. United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971). *See also* Sagers v. Yellow Freight System, Inc., 388 F. Supp. 507 (N.D. Ga. 1973); United States v. Local 638, Enterprise Ass'n of Steam, 360 F. Supp. 979 (S.D.N.Y. 1973), *aff'd on other grounds*, 501 F.2d 622 (2d Cir. 1974).

79. *See* notes 47-48 and accompanying text *supra*.

80. *See* Chicago Comment, *supra* note 14, at 920, where the author states that, while courts may formulate their business necessity tests in other words, the *Lorillard* test is still the conventional one.

81. *Accord* Mieth v. Dothard, 418 F. Supp. 1169 (M.D. Ala.), *aff'd in part, rev'd in part on other grounds*, 433 U.S. 321 (1977).

82. *See generally* New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405 (1973);

Two major interpretations of the goals of fair employment laws such as Title VII have been advanced: equal achievement and equal treatment.[83] The equal achievement interpretation analyzes the literal outcome of job distribution. It emphasizes the practical consequences of the use of race as an employment criterion. This theory ultimately proposes a redistribution of jobs in order to place minority workers on equal footing with the majority.[84] The alternative interpretation, proposing equal treatment of individuals, completely ignores race in employment decisions and thus hopes to place the minorities in a position of equal opportunity with the majority.[85]

A close reading of the legislative history of Title VII suggests that it adopts an equal treatment approach.[86] It proposes the norm of "color blindness" in employment decisions. But even with this foundation of color blindness, the framers, cognizant of the financial and production aspects of a business, were sensitive to the potential costs this law could im-

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Helvering v. Stockholms Enskilda Bank, 293 U.S. 84 (1934); Costanzo v. Tillinghast, 287 U.S. 341 (1932); Danciger v. Cooley, 248 U.S. 319 (1919).

83. Professor Fiss states that there are two theories on interpreting fair employment laws. Fiss, *supra* note 2, at 239-49. This has become the standard form of interpretation. Chicago Comment, *supra* note 14, at 921. In this comment, the author analyzes the business necessity defense under these two theories and concludes that the equal treatment interpretation is more suitable to the present application of the business necessity defense. *Id.* at 921-25.

84. Fiss states five possible theories underlying this interpretation: self-interest of blacks, redistribution of wealth from rich to poor, efficiency, furtherance of social objectives, and responsibility for inferior economic position. Fiss, *supra* note 2, at 245-49. *See also* Tobin, *On Improving the Economic Status of the Negro*, 94 DAEDALUS 878 (1965) (predicting that an ever-increasing demand for labor will eventually improve the status of blacks).

85. Fiss suggests that two principles are at the root of this theory. First, an individual's race is not an accurate predictor of his productivity. Second, to judge a person on the basis of race is to do so on the basis of a predetermined factor. *But see* Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern*, 34 U. CHI. L. REV. 817 (1967) (suggesting that Fiss' correlation between employment laws and economic status may be unfounded).

86. Senators Clark and Case, the floor managers of Title VII, defined discrimination in a memo which comports with the equal treatment interpretation:

> To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any of the five forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title. 110 CONG. REC. 7213 (1964).

See also 117 CONG. REC. 31974 (1971) (Rep. Mitchell's remark that "we have an objective of equal treatment under the law."). For comments made during the 1964 hearings on the debate between equal achievement and equal treatment, *see* 110 CONG. REC 1518 (1964) (remarks of Rep. Celler); *id.* at 1540 (remarks of Rep. Lindsey); *id.* at 5092, 5094 (Sen. Humphrey's remarks); *id.* at 12617 (remarks of Sen. Muskie). *See generally* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. AND COM. L. REV. 431 (1966); Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

pose. With this in mind, the legislature attempted to draft Title VII carefully to avoid interference with the production or efficiency of an established operation.[87] At the same time, they tried to minimize compliance hardships for employers.[88] Furthermore, when Title VII was amended in 1972, Congress explicitly considered and approved the *Griggs* business related standard.[89] It is apparent that the drafters of Title VII intended to alleviate all forms of discrimination, but not in a way which would disrupt the efficiency of a necessary business practice.[90]

In applying Title VII's objective of equal treatment of individuals to the proposed extension of the business necessity defense, a facial conflict appears to exist. Since the extension advances the use of race as an employment criterion, it appears to conflict directly with the accepted goal of Title VII. Yet the direct and essential relationship between the proposed extension and job performance can be sufficient to justify the use of race as an employment criterion when it is warranted by the circumstances of the case. Thus, when a challenged employment practice can be justified in terms of business necessity, it would not be contrary to the legislative history of Title VII to allow the use of race as an employment criterion if the defense is applied in a limited manner.

B. Extension of the Business Necessity Defense

Most of the cases in which the business necessity defense has arisen have involved factual situations similar to *Griggs*.[91] Almost universally, the de-

87. *See* Memo by Senator Case which states:

> Whatever its merits as a socially desirable objective, title VII would not require, and no court could read title VII as requiring, an employer to lower or change the occupational qualifications he sets for his employees simply because proportionately fewer Negroes than whites are able to meet them. Thus, it would be ridiculous, indeed, in addition to being contrary to title VII, for a court to order an employer who wanted to hire electronics engineers with Ph.D.'s to lower his requirements because there were very few Negroes with such degrees or because prior cultural or educational deprivation of Negroes prevented them from qualifying. And, unlike the hearing examiner's interpretation of the Illinois law in the Motorola case, title VII most certainly would not authorize any requirement that an employer accept an unqualified applicant or a less qualified applicant and undertake to give him any additional training which might be necessary to enable him to fill the job.

110 CONG. REC. 7246-47 (1964).

88. *Id.*

89. *See, e.g.*, 117 CONG. REC. 31961 (1971) (remarks of Rep. Perkins).

90. *See* note 87 *supra*.

91. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976); Friend v. Leidinger, 446 F. Supp. 361 (E.D. Va. 1977), *aff'd*, 588 F.2d 61 (4th Cir. 1978); United States v. Virginia, 454 F. Supp. 1077 (E.D. Va. 1978); Bridgeport Guardians v. Bridgeport Police Dep't, 431 F. Supp. 931 (D. Conn. 1977).

fense has been applied to practices which are fair in form but discriminatory in effect. Even in these cases, the defense has been restrictively applied.[92] This judicial conservatism is critically linked to the recognition of the Title VII's vital purpose and the view that a liberal interpretation of business necessity would frustrate that purpose.[93] In attempting to limit broad ramifications of decisions accepting the business necessity defense, courts have specifically limited their holdings to the unique factual situations before them.[94] Despite this limited application, an employer can still present a court with the requisite factual criteria to establish the defense. When an employer can meet the required burdens of proof, and where the acceptance of the defense would not undermine the purpose of Title VII, a court must accept the business necessity defense.

In contrast to the business necessity defense, the BFOQ provision has been judicially interpreted as intentionally limited.[95] Perceiving the potential for an exception of this nature to undermine the basic objective of Title VII, courts have found the omission of race from the BFOQ provision to be a deliberate act by Congress.[96] Thus, the BFOQ defense has been very narrowly applied and used only in the few situations contemplated by its language.[97] The BFOQ provision contemplates a practice that is "reasonably necessary"[98] to a business endeavor, while the business necessity defense is phrased in terms of absolute necessity.[99] Since the latter was judicially created to apply to circumstances not covered by the former, it should logically apply to a wider array of situations. Thus, the burden of proof in the business necessity defense is correspondingly higher than in the BFOQ provision.

If a court were presented with an employer's attempt to justify overtly discriminatory hiring criteria not covered by the BFOQ provision by using the business necessity defense, logically there would be nothing to bar the court from accepting this defense, as long as the employer could meet the stringent burdens of proof. While this may appear, at first glance, to be an extreme proposition, it is harmonious with the language of *Griggs* and the legislative intent of Title VII.

Initially, there is no language in the *Griggs* decision limiting the business

92. *See* cases cited in note 91 *supra*.
93. *See Annotation*, 36 A.L.R. Fed. 9, 28 (1978).
94. *See* cases cited in note 91 *supra*.
95. Swint v. Pullman-Standard, 624 F.2d 525, 534-35 (5th Cir. 1980).
96. *Id.*
97. *Id.*
98. 42 U.S.C. § 2000e-2(e) (1976).
99. *See* notes 75-78 and accompanying text *supra*.

necessity defense to the factual situation presented therein. The decision was couched in general terms in which the Court enunciated the employment practices forbidden by Title VII:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[100]

With this language, the Court created the concept of business necessity, but left the hazards of its application to lower courts.

While the theory that employment decisions made in consideration of race can be justified through business necessity may be novel, courts have previously recognized the possibility that some employment decisions could be based on race. Though the cases do not employ a business necessity analysis *per se*, the underlying theories espoused are nevertheless significant. The United States Court of Appeals for the Fifth Circuit considered such a case in *Baker v. City of St. Petersburg*,[101] which was brought under a constitutional challenge since, at the time the litigation occurred, Title VII was not applicable to municipal police departments.[102] The case challenged certain practices of the city's police department to assign black officers to only one geographic zone, an area which encompassed all the major black areas of the city.[103] Although white officers were occasionally assigned to zones overlapping part of the unique zone, a white officer was never assigned solely to that particular zone.[104]

In its decision, the court invalidated this pattern of assignments as violative of the equal protection clause. However, it specifically limited the effects of its holding to the situation presented by the case, *i.e.*, where black officers were assigned exclusively and permanently to patrol one area.[105] The court left open the possibility that assignments could be made on the basis of race if they were made in a way which would not offend constitutional rights.[106] The court even presented two situations when decisions

100. 401 U.S. at 431.

101. 400 F.2d 294 (5th Cir. 1968). *See generally* Note, *Constitutional Law—Equal Protection Clause Bars Assignment of Police Officers Solely on the Basis of Race*, 19 J. PUB. LAW 189 (1969); Comment, *Race as a Basis for Police Duty Assignments*, 49 B.U.L. REV. 590 (1969).

102. Blake v. City of Los Angeles, 595 F.2d 1367, 1373-74 (9th Cir. 1979) (case upholding the constitutionality of the 1972 amendments which extend Title VII's coverage to municipal employees).

103. 400 F.2d at 295-96.

104. *Id.* at 296.

105. *Id.* at 300-301.

106. *Id.*

based on race could be justified: undercover work and periods of high racial tension.[107] While the racially-based policy in this case was struck down, the decision illustrates a judicial attempt to validate assignments based on race in a unique but realistic situation.

A recent circuit court case involving a claim of overt racial discrimination illustrates the possible application of the business necessity doctrine to validate a similar employment situation. Application of the test as formulated in *Lorillard* does not foreclose the possibility of an employer's asserting and a court's accepting this defense against a claim of overt racial discrimination. In *Miller v. Texas State Board of Barber Examiners*,[108] the plaintiff alleged that an employment practice was overtly discriminatory and thus violative of Title VII. Miller, a black male, was hired by the Board in 1967 as an undercover investigator of state barber shops and colleges. He held this position for four years, investigating both black and white facilities. In 1969, Miller was promoted to the position of inspector for the express reason that white inspectors who were assigned to inspect black barber shops had refused to do so for fear of physical violence. Miller's supervisors explained the situation to him explicitly and offered him the promotion, making it clear that he would inspect primarily black shops. Miller accepted the promotion.

Miller worked until 1973, inspecting mostly black barber shops. Unlike the majority of other inspectors, however, he was assigned to a specific district which covered an area larger than that of the other inspectors. During this time Miller travelled throughout the city and voiced no complaints concerning his assignment.

In 1973, four years after his promotion, the Board became dissatisfied with Miller's work. The Board members asserted that he conducted unauthorized inspections outside his assigned area, causing a strain on the budget for travel and per diem expenses. The Board was also dissatisfied with the apparent quality of the inspections Miller conducted. After discussing this situation at an employment hearing, the Board voted to transfer Miller to the Houston area in an attempt to rehabilitate him. Upon receiving these instructions from his supervisor, Miller neither followed

107. The court presented these examples, specifically restricting its holding by stating "[w]e do not hold that the assignment of a Negro officer to a particular task because he is a Negro can never be justified." *Id.* In a footnote to this sentence the court stated: "For example, the undercover infiltration of an all-Negro criminal organization or plainclothes work in an area where a white man could not pass without notice. Special assignments might also be justified during brief periods of unusually high racial tension." *Id.* at 301 n.11.

108. 615 F.2d 650 (5th Cir. 1980).

them nor informed the Board of his opposition to them. Shortly thereafter, he was discharged.

After exhausting the available administrative remedies, Miller instituted a Title VII discrimination action against the Board. He had two claims: first, that he was fired because of his race; and second, that his original job assignment constituted treatment tantamount to a constructive discharge.[109] The first claim was dealt with summarily by both the district and circuit courts. The circuit court found that there was substantial evidence to support the district court's finding that Miller was discharged not because of his race, but because he refused to go to Houston and did not inform the Board of his opposition to the transfer.[110]

It was in examining Miller's second claim that the circuit court discussed the concept of business necessity. Miller specifically alleged that the deliberately disparate treatment he had received in his job assignment constituted the basis for his refusal to go to Houston, an act which ultimately led to his discharge. Based on this claim of unfair assignment to only black shops, the court decided Miller's case, holding that Miller was not entitled to any back pay or benefits because he had suffered no financial loss due to his assignment[111] and that he was not entitled to reinstatement because he had been discharged for a valid reason.[112] The court lastly denied him an award of attorney's fees.[113]

Though the concept of business necessity was not ruled upon by the circuit court, the case presents a unique factual situation in which the defense as formulated in *Lorillard* could logically be extended to Miller's assignment because of race. This conclusion appeared so logical that appellant, appellee and the trial judge simply assumed that the business necessity defense was applicable to the overtly discriminatory practice.[114]

109. *Id.* at 652. The doctrine of constructive discharge grants a Title VII cause of action for wrongful discharge when an employer intentionally creates a discriminatory environment which literally forces the employee to involuntary resignation. Calcote v. Texas Educ. Foundation, Inc., 578 F.2d 95, 97 (5th Cir. 1978), *citing*, Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975).

110. 615 F.2d at 652.

111. *Id.* at 654.

112. *Id.*

113. *Id.* at 655.

114. *Id.* at 654. The pertinent part of the district court's unreported memorandum opinion and order states:

> The Court is of the opinion that Defendant has rebutted Plaintiff's allegation of any racial discrimination by Defendant against him, either during his employment or at the time of his termination. Defendant's different treatment of Plaintiff during his employment as an investigator and an inspector appears to the Court to have been justified because of Defendant's legitimate purpose of investigating and overseeing the operations of black barber shops. Since there were no other black

The issue tried was not whether the business necessity defense applied, but whether the Board's practice met the requirements of business necessity.[115] If a court were to apply the factors as set forth in *Lorillard*, the practice could probably be justified under the business necessity defense.[116]

The first prong of the *Lorillard* test balances the importance of the business purpose advanced by the criterion against its racially discriminatory impact.[117] The racial impact of Miller's original assignment, to inspect only black barber shops, was a condition of which Miller had been aware when promoted. Realistically, it was the reason for his promotion in 1973. In his suit, however, Miller complained not about this but rather about his assignment to the Houston area.[118] The tangible racial effects were limited to Miller himself and resulted from a condition of which he was aware. Further, Miller did not demonstrate that he was limited to inspecting black shops, but only that he was assigned on a basis of need.

On the other side of the balance, the purpose of the assignment was twofold: to enforce compliance with safety and health regulations and to minimize any threat of physical violence to the other inspectors. The first purpose advanced the general goal of inspection of the facilities. Miller was to make sure each facility was safe and in compliance with state health provisions, the job of all inspectors. The second purpose, however, presented the unique situation where, because of his race, Miller was the only inspector who could safely accomplish this task. The other inspectors, who were white, refused to inspect the facilities because of a fear of violence. If they were forced to go to these shops, they would have been fearful and would probably have performed a cursory inspection or blatantly refused to perform any inspection at all. In Miller's case, these problems were not present. Balancing the need for enforcement of safety and health codes against the racial impact of having Miller inspect all the black shops, the balance should logically sway toward safety and health.

> investigators or inspectors and since the remaining investigators and inspectors would not do the job that Plaintiff willingly did, Defendant was justified in requiring that Plaintiff investigate or inspect primarily black barber shops.

Brief for Appellant at 9-10, Miller v. Texas State Board of Barber Examiners, 615 F.2d 650 (5th Cir. 1980). The court also concluded that plaintiff's termination was not based on race:

> Defendant had requested that Plaintiff report to work in Houston in October 1973, and when Plaintiff failed to appear, he was terminated. Plaintiff was not treated differently because of his race or any other reason when he was terminated, but rather he was treated as any other employee who failed to report for work.

Id. at 10.

115. 615 F.2d at 654.

116. The circuit court did not decide if the doctrine was applicable.

117. *See* notes 61-63 and accompanying text *supra*.

118. 615 F.2d at 652.

In apportioning the burden of proof according to the second phase of *Lorillard*,[119] Miller would easily meet the burden of establishing a *prima facie* case of discrimination.[120] The circuit court admitted that Miller was treated differently because of his race, and this would meet the minimum requirements of a discrimination case.[121] After this, the burden would shift to the Board to establish the requisite relationship between the assignment and the business purpose. The Board could assert as justification the increased safety and efficiency resulting from Miller's assignment since he could perform complete inspections without the threat of physical violence. This would establish the relationship between the practice and the purpose, that is, compliance with public health regulations. In doing this, the Board would sustain its required burden to rebut the charge of discrimination.

The last aspect of the *Lorillard* test[122] requires examination of the alternatives available to the Board. The option of forcing white inspectors to inspect shops where they would be threatened does not appear viable. The inspectors would perform either minimal inspections or no inspections and ultimately quit or be fired. This would surely thwart the goal of inspection of the shops. Likewise, assigning Miller surreptitiously to only black shops would prove unworkable because he would be unaware of his differential treatment. The only viable solution available to the Board was to confront Miller with the situation and offer him the job of inspecting primarily black shops. Faced with these choices, the Board should be able to show the degree of absolute necessity required to justify its action.

III. Conclusion

Although the courts are not often confronted with cases such as *Miller*, such situations do arise, and therefore a method by which a court could analyze a proposed defense is essential. Though the statement of the Ninth Circuit that "virtually any prima facie case under Title VII may be rebutted as job related or necessary to business,"[123] may extend the business necessity defense to an extreme degree, a judicial recognition that business necessity may be utilized in cases of legitimate employer need is definitely warranted. Adoption of this defense would not be violative of the purposes of Title VII nor of prior judicial interpretations of the defense.

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119. *See* notes 64-74 and accompanying text *supra*.
120. *Id.*
121. 615 F.2d at 653-54.
122. *See* notes 75-78 and accompanying text *supra*.
123. deLaurier v. San Diego Unified School Dist., 588 F.2d 674, 678 (9th Cir. 1978).

Presently, an employer may be unable to validate a Title VII challenge to an employment practice. Of the limited judicially recognized defenses available under Title VII, the defense of business necessity conforms most easily to the greatest variety of situations. In terms of application of precedent and logic, the defense is not necessarily limited to the situations in which it is presently applied. Since business necessity was judicially created to meet the needs of a unique situation, it can be judicially extended to meet the needs of other unique situations as they arise.

James J. Gupko